

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Aug 24, 2021

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

CHARLES S.,¹

Plaintiff,

vs.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,²

Defendant.

No. 1:20-cv-03108-MKD

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

ECF Nos. 17, 18

¹ To protect the privacy of plaintiffs in social security cases, the undersigned identifies them by only their first names and the initial of their last names. *See* LCivR 5.2(c).

² Kilolo Kijakazi became the Acting Commissioner of Social Security on July 9, 2021. Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, Kilolo Kijakazi is substituted for Andrew M. Saul as the defendant in this suit. No further action need be taken to continue this suit. *See* 42 U.S.C. § 405(g).

1 Before the Court are the parties' cross-motions for summary judgment. ECF
2 Nos. 17, 18. The parties consented to proceed before a magistrate judge. ECF No.
3 6. The Court, having reviewed the administrative record and the parties' briefing,
4 is fully informed. For the reasons discussed below, the Court denies Plaintiff's
5 motion, ECF No. 17, and grants Defendant's motion, ECF No. 18.

6 JURISDICTION

7 The Court has jurisdiction over this case pursuant to 42 U.S.C. §§ 405(g);
8 1383(c)(3).

9 STANDARD OF REVIEW

10 A district court's review of a final decision of the Commissioner of Social
11 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
12 limited; the Commissioner's decision will be disturbed "only if it is not supported
13 by substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153,
14 1158 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a
15 reasonable mind might accept as adequate to support a conclusion." *Id.* at 1159
16 (quotation and citation omitted). Stated differently, substantial evidence equates to
17 "more than a mere scintilla[,] but less than a preponderance." *Id.* (quotation and
18 citation omitted). In determining whether the standard has been satisfied, a
19 reviewing court must consider the entire record as a whole rather than searching
20 for supporting evidence in isolation. *Id.*

1 In reviewing a denial of benefits, a district court may not substitute its
2 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152,
3 1156 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
4 rational interpretation, [the court] must uphold the ALJ’s findings if they are
5 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
6 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an
7 ALJ’s decision on account of an error that is harmless.” *Id.* An error is harmless
8 “where it is inconsequential to the [ALJ’s] ultimate nondisability determination.”
9 *Id.* at 1115 (quotation and citation omitted). The party appealing the ALJ’s
10 decision generally bears the burden of establishing that it was harmed. *Shinseki v.*
11 *Sanders*, 556 U.S. 396, 409-10 (2009).

12 **FIVE-STEP EVALUATION PROCESS**

13 A claimant must satisfy two conditions to be considered “disabled” within
14 the meaning of the Social Security Act. First, the claimant must be “unable to
15 engage in any substantial gainful activity by reason of any medically determinable
16 physical or mental impairment which can be expected to result in death or which
17 has lasted or can be expected to last for a continuous period of not less than twelve
18 months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s
19 impairment must be “of such severity that he is not only unable to do his previous
20 work[,] but cannot, considering his age, education, and work experience, engage in

1 any other kind of substantial gainful work which exists in the national economy.”

2 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).

3 The Commissioner has established a five-step sequential analysis to
4 determine whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§
5 404.1520(a)(4)(i)-(v), 416.920(a)(4)(i)-(v). At step one, the Commissioner
6 considers the claimant’s work activity. 20 C.F.R. §§ 404.1520(a)(4)(i),
7 416.920(a)(4)(i). If the claimant is engaged in “substantial gainful activity,” the
8 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
9 404.1520(b), 416.920(b).

10 If the claimant is not engaged in substantial gainful activity, the analysis
11 proceeds to step two. At this step, the Commissioner considers the severity of the
12 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
13 claimant suffers from “any impairment or combination of impairments which
14 significantly limits [his or her] physical or mental ability to do basic work
15 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
16 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
17 however, the Commissioner must find that the claimant is not disabled. *Id.*

18 At step three, the Commissioner compares the claimant’s impairment to
19 severe impairments recognized by the Commissioner to be so severe as to preclude
20 a person from engaging in substantial gainful activity. 20 C.F.R. §§

1 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more
2 severe than one of the enumerated impairments, the Commissioner must find the
3 claimant disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

4 If the severity of the claimant's impairment does not meet or exceed the
5 severity of the enumerated impairments, the Commissioner must pause to assess
6 the claimant's "residual functional capacity." Residual functional capacity (RFC),
7 defined generally as the claimant's ability to perform physical and mental work
8 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
9 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
10 analysis.

11 At step four, the Commissioner considers whether, in view of the claimant's
12 RFC, the claimant is capable of performing work that he or she has performed in
13 the past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv).
14 If the claimant is capable of performing past relevant work, the Commissioner
15 must find that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f).
16 If the claimant is incapable of performing such work, the analysis proceeds to step
17 five.

18 At step five, the Commissioner considers whether, in view of the claimant's
19 RFC, the claimant is capable of performing other work in the national economy.
20 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this determination,

1 the Commissioner must also consider vocational factors such as the claimant's age,
2 education, and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),
3 416.920(a)(4)(v). If the claimant is capable of adjusting to other work, the
4 Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
5 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
6 work, analysis concludes with a finding that the claimant is disabled and is
7 therefore entitled to benefits. *Id.*

8 The claimant bears the burden of proof at steps one through four above.
9 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
10 step five, the burden shifts to the Commissioner to establish that 1) the claimant is
11 capable of performing other work; and 2) such work "exists in significant numbers
12 in the national economy." 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*
13 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

14 **ALJ'S FINDINGS**

15 On July 28, 2016, Plaintiff applied both for Title II disability insurance
16 benefits and Title XVI supplemental security income benefits alleging a disability
17 onset date of August 1, 2010. Tr. 34, 119, 135, 267-79. The applications were
18 denied initially and on reconsideration. Tr. 165-71, 177-88. Plaintiff appeared
19 before an administrative law judge (ALJ) on August 15, 2018, and the hearing was
20 continued so the record could be developed. Tr. 62-73. Plaintiff appeared before

1 an ALJ on May 8, 2019, and the hearing again was continued so the record could
2 be developed. Tr. 74-82. Plaintiff appeared before an ALJ on August 21, 2019 for
3 a hearing that resulted in a decision. Tr. 83-107. On September 4, 2019, the ALJ
4 denied Plaintiff's claim. Tr. 31-53.

5 At step one of the sequential evaluation process, the ALJ found Plaintiff,
6 who met the insured status requirements through September 30, 2010, has not
7 engaged in substantial gainful activity since August 1, 2010. Tr. 36. At step two,
8 the ALJ found that Plaintiff has the following severe impairments: degenerative
9 disc disease of the lumbar spine, status post open fracture and dislocation of the
10 right elbow, left shoulder degenerative joint disease, depression, and a history of
11 alcohol abuse. Tr. 36-37.

12 At step three, the ALJ found Plaintiff does not have an impairment or
13 combination of impairments that meets or medically equals the severity of a listed
14 impairment. Tr. 37. The ALJ then concluded that Plaintiff has the RFC to perform
15 light work with the following limitations:

16 frequent climbing of ramps or stairs; frequent balancing, stooping, kneeling,
17 and crouching; occasional climbing of ladders, ropes, or scaffolding;
18 occasional crawling; frequent fingering, handling, and feeling with the right
19 upper extremity; frequent overhead reaching with the left upper extremity;
20 avoidance of concentrated exposure to non-weather related extreme cold,
excessive vibration, and unprotected heights. Further, the work is limited to
1 to 3 step tasks and occasional interaction with coworkers and the general
public.

Tr. 39.

1 At step four, the ALJ found Plaintiff is unable to perform any of his past
2 relevant work. Tr. 45. At step five, the ALJ found that, considering Plaintiff's
3 age, education, work experience, RFC, and testimony from the vocational expert,
4 there were jobs that existed in significant numbers in the national economy that
5 Plaintiff could perform, such as production assembler, hand packager, and mail
6 clerk. Tr. 46. Therefore, the ALJ concluded Plaintiff was not under a disability, as
7 defined in the Social Security Act, from the alleged onset date of August 1, 2010,
8 through the date of the decision. *Id.*

9 On May 22, 2020, the Appeals Council denied review of the ALJ's decision,
10 Tr. 1-6, making the ALJ's decision the Commissioner's final decision for purposes
11 of judicial review. *See* 42 U.S.C. § 1383(c)(3).

12 ISSUES

13 Plaintiff seeks judicial review of the Commissioner's final decision denying
14 him disability insurance benefits under Title II and supplemental security income
15 benefits under Title XVI of the Social Security Act. Plaintiff raises the following
16 issues for review:

- 17 1. Whether the ALJ properly developed the record;
- 18 2. Whether the ALJ properly evaluated Plaintiff's symptom claims; and
- 19 3. Whether the ALJ properly evaluated the medical opinion evidence.

20 ECF No. 17 at 2.

DISCUSSION

A. Record Development

Plaintiff contends the ALJ failed to properly develop the record. ECF No. 17 at 4-10. The ALJ has an independent duty to fully and fairly develop a record in order to make a fair determination as to disability, even where, as here, the claimant was represented by counsel for a portion of the application period. *Celaya v. Halter*, 332 F.3d 1177, 1183 (9th Cir. 2003); *see also Tonapetyan v. Halter*, 242 F.3d 1144, 1150 (9th Cir. 2001); *Crane v. Shalala*, 76 F.3d 251, 255 (9th Cir. 1996). “Ambiguous evidence, or the ALJ’s own finding that the record is inadequate to allow for proper evaluation of the evidence, triggers the ALJ’s duty to ‘conduct an appropriate inquiry.’” *See Tonapetyan*, 242 F.3d at 1150 (quoting *Smolen v. Chater*, 80 F.3d 1273, 1288 (9th Cir. 1996)).

1. Workers’ Compensation Records

Plaintiff contends the ALJ erred in failing to obtain records related to Plaintiff’s workers’ compensation claim. ECF No. 17 at 5-8. When Plaintiff applied for Social Security benefits, Plaintiff reported Washington’s Labor and Industry office as a source of records; Plaintiff reported he had an injury in 2006 and was trying to reopen his prior claim. Tr. 309. The records indicate Plaintiff’s workers’ compensation records were received by Disability Determination Services on September 22, 2016. Tr. 110, 165. While the request sent by

1 Disability Determination Services to obtain Plaintiff's workers' compensation
2 records is not in the file, the requests sent to other facilities demonstrate Disability
3 Determination Services developed the record back to 2009-2010. Tr. 411, 577,
4 583. The records from Labor and Industry include a May 2014 evaluation and a
5 July 2014 evaluation, both of which include a summary of the history of Plaintiff's
6 workers' compensation claim. Tr. 392-410.

7 Plaintiff's initial back injury occurred in 2006, and Plaintiff sought multiple
8 forms of treatment for his injury through 2006. Tr. 401-02. Plaintiff was
9 evaluated in 2008, and an examiner recommended a work conditioning program.
10 Tr. 402. In 2009, an examiner opined Plaintiff was at maximum medical
11 improvement and assigned Plaintiff a category II level of lumbosacral impairment.
12 Tr. 402-03. Plaintiff accepted a settlement to take a payout, and received
13 vocational services but did not complete the retraining program. Tr. 394, 396, 403.
14 In 2014, Plaintiff sought reopening of his claim; Plaintiff reported he tried to return
15 to work in 2009 but was unable to work more than a few weeks, and his
16 subsequent attempts were also unsuccessful. *Id.* Plaintiff sought reopening of the
17 claim due to worsening pain and decreased mobility. *Id.* At the May 2014
18 examination, Plaintiff's Waddell's testing was positive for five out of five tests,
19 and Plaintiff discontinued the examination early as he reported he did not feel well.
20 Tr. 397-98. The examiner opined Plaintiff's reported left shoulder and neck

1 immobility and decreased grip strength were not related to his back injury, and
2 opined there was no worsening of Plaintiff's back injury. Tr. 398-99. The July
3 2014 examiner opined Plaintiff had not had worsening of his back impairment, and
4 that the limitations on examination were inconsistent and unreliable, and likely due
5 to self-limiting behavior. Tr. 409-10. Plaintiff's application to reopen his claim
6 was denied. Tr. 414-20.

7 Plaintiff contends the ALJ erred by failing to seek additional workers'
8 compensation records, including evidence of Plaintiff's permanent disability,
9 settlement, and work retraining. ECF No. 17 at 6-7. However, Plaintiff
10 acknowledges that Disability Determination Services already developed the record
11 by requesting Plaintiff's workers' compensation records, and they received
12 responsive records. ECF No. 17 at 7 (citing Tr. 393-94). As discussed *supra*, the
13 workers' compensation records in file discuss Plaintiff's permanent disability
14 rating, receipt of a settlement, and failure to complete a work retraining program.
15 If additional workers' compensation records exist that Labor and Industry failed to
16 include in response to Disability Determination Services' request, Plaintiff had the
17 opportunity to request the records from Labor and Industry, and submit the
18 records, or provide a copy of Labor and Industry's response that indicates the
19 timeframe and number of pages of records in their possession. As Disability
20 Determination Services requested Plaintiff's workers' compensation records, and

1 received responsive records, the ALJ found the evidence was not ambiguous nor
2 inadequate to make a determination, the ALJ did not error in declining to order
3 additional workers' compensation records. *See Tonapetyan*, 242 F.3d at 1150.

4 Plaintiff also argues the failure to obtain the additional workers'
5 compensation records is harmful because the records contain evidence of
6 Plaintiff's permanent disability. ECF No. 17 at 7. However, the records indicate
7 Plaintiff's impairment was labeled a category II lumbosacral spine impairment. Tr.
8 393. A category II impairment is defined as, "mild low back impairment, with
9 mild intermittent objective clinical findings of such impairment but no significant
10 x-ray findings and no significant objective motor loss. Subjective complaints
11 and/or sensory losses may be present." Wash. Admin. Code 296-20-280(2).
12 Plaintiff has not demonstrated that any additional records containing evidence of
13 his mild back impairment would have impacted the ALJ's decision, thus any error
14 is harmless. *See Molina*, 674 F.3d at 1115.

15 *2. Neuropsychological Consultative Examination*

16 Plaintiff contends the ALJ erred by not ordering a neuropsychological
17 consultative examination, because the record was ambiguous and insufficient as to
18 his potential neurocognitive disorder, and because there were inconsistent opinions
19 in the record. ECF No. 17 at 8-9; ECF No. 19 at 2. Plaintiff testified he has a
20 brain injury that prevented him from completing retraining. Tr. 67, 71, 79, 93-95.

1 There are numerous inconsistencies in the record related to Plaintiff's reported
2 brain injury. Plaintiff did not allege a brain injury in his application for benefits,
3 Tr. 303, but reported in his function report that he has difficulties with memory and
4 decision making due to a brain injury, Tr. 330. The 2014 summary of Plaintiff's
5 workers' compensation claim contains no mention of a brain injury. Tr. 392-95.
6 When asked about his medical history at one of the 2014 workers' compensation
7 examinations, Plaintiff reported a concussion in 2007 but no brain injury. Tr. 396.
8 In 2017, Plaintiff reported a brain injury in 2009 or 2011. Tr. 511. One medical
9 record notes a history of traumatic brain injury, Tr. 649, while in other treatment
10 records, a "head injury" is noted, but there is no mention of a brain injury, and at
11 multiple visits Plaintiff did not report a brain injury nor is one documented in his
12 medical history, Tr. 413, 442, 670. A self-reported history of brain surgery is
13 noted in some records, Tr. 440, 563, however there are no records related to brain
14 surgery nor did Plaintiff provide any details regarding the reported surgery.

15 At a psychological evaluation with Dr. Cline, Plaintiff reported a 2008 brain
16 injury. Tr. 484. Plaintiff reported he had a head injury that resulted in a loss of
17 consciousness, and reported he was in a coma for a period of time and in an
18 intensive care unit for two days. Tr. 485. Plaintiff reported memory issues since
19 his head injury, but reported no neurological follow-up. *Id.* Dr. Cline opined
20 Plaintiff had moderate to marked limitations due to neurocognitive deficits, and

1 opined a neuropsychological consult would be needed to evaluate the condition.
2 Tr. 485, 487. Dr. Cline also noted Plaintiff's Rey score indicates a below average
3 level of effort, although his TOMM score was sufficient to rule out malingering.
4 Tr. 485. However, Dr. VanFossen reviewed Dr. Cline's evaluation and noted Dr.
5 Cline's determination that the score was sufficient to rule out malingering was not
6 supported by the literature on the TOMM. Tr. 501. Dr. VanFossen opined a
7 diagnosis of a neurocognitive disorder was not supported in the context of no
8 significant neuropsychological testing and Plaintiff failing the only validity test
9 given at Dr. Cline's examination. *Id.*

10 Plaintiff's date last insured was September 30, 2010, and a
11 neuropsychological examination in the present time would not provide relevant
12 information as to Plaintiff's functioning at his date last insured. Further, Disability
13 Determination Services developed the records back to 2009 and did not receive
14 any responsive medical records that contain objective evidence of Plaintiff's
15 reported head injury, coma, nor intensive care unit treatment. Plaintiff reported a
16 head injury more than one year prior to his alleged onset date, and Plaintiff has not
17 had any neurological follow-up during the relevant time period. Tr. 396, 485.
18 While Dr. Cline gave a provisional diagnosis of mild neurocognitive disorder due
19 to a traumatic brain injury, Tr. 642, Plaintiff has not been diagnosed with a brain
20 injury nor neurocognitive disorder, and Plaintiff has not provided any objective

1 evidence of limitations caused by his reported brain injury. The only testing in the
2 record related to the reported condition is Dr. Cline's examination, and Dr.
3 VanFossen found Dr. Cline's diagnoses and opinions were unsupported by the
4 evidence, and noted Plaintiff has no functional impairment due to a mental health
5 diagnosis that would prohibit work tasks, in the context of poor credibility on
6 validity testing. Tr. 37, 501. Given the lack of any objective evidence to support
7 Plaintiff's allegation of a brain injury, the lack of a diagnosis of a neurocognitive
8 disorder, Plaintiff's lack of any neurological follow-up during the relevant period,
9 Plaintiff failing the validity testing during the only psychological testing in file,
10 and Dr. VanFossen's opinion that Dr. Cline's diagnoses and opinions were not
11 supported by the evidence, there is no objective evidence to support Plaintiff's
12 contention that he has limitations due to a brain injury that required further
13 development. Plaintiff has not demonstrated that the evidence was ambiguous or
14 insufficient to make a determination.

15 The instant case is distinguishable from a recent Ninth Circuit holding which
16 found an ALJ erred in failing to develop the record. The Ninth Circuit held in
17 *Alderson* that the ALJ erred in failing to order a new psychological examination.
18 *Alderson v. Saul*, No. 20-35638, 2021 WL 2624128, at *1 (9th Cir. June 25, 2021).
19 In *Alderson*, a medical expert opined a new examination would be helpful, and
20 Plaintiff had a history of mental health diagnoses and abnormal psychological

1 findings. Like *Alderson*, the Plaintiff here has not sought ongoing care for the
2 alleged condition. *See id.* However, here, Plaintiff has not provided objective
3 evidence of a neuropsychological condition, and he does not have a history of
4 abnormal neuropsychological findings. While Dr. Cline opined a
5 neuropsychological examination would be needed, Tr. 487, Dr. VanFossen found
6 Dr. Cline's opinion was not supported by the examination, and found Plaintiff had
7 failed the validity testing, Tr. 501. Unlike the Plaintiff in *Alderson*, Plaintiff here
8 lacks the objective evidence to support the need for an examination. The ALJ's
9 finding that Plaintiff did not have a severe neurocognitive disorder is supported by
10 substantial evidence and the ALJ did not err in not ordering a neuropsychological
11 consultative examination. Plaintiff is not entitled to remand on these grounds.

12 **B. Plaintiff's Symptom Claims**

13 Plaintiff faults the ALJ for failing to rely on reasons that were clear and
14 convincing in discrediting his symptom claims. ECF No. 17 at 10-15. An ALJ
15 engages in a two-step analysis to determine whether to discount a claimant's
16 testimony regarding subjective symptoms. SSR 16-3p, 2016 WL 1119029, at *2.
17 "First, the ALJ must determine whether there is objective medical evidence of an
18 underlying impairment which could reasonably be expected to produce the pain or
19 other symptoms alleged." *Molina*, 674 F.3d at 1112 (quotation marks omitted).
20 "The claimant is not required to show that [the claimant's] impairment could

1 reasonably be expected to cause the severity of the symptom [the claimant] has
2 alleged; [the claimant] need only show that it could reasonably have caused some
3 degree of the symptom.” *Vasquez v. Astrue*, 572 F.3d 586, 591 (9th Cir. 2009).

4 Second, “[i]f the claimant meets the first test and there is no evidence of
5 malingering, the ALJ can only reject the claimant’s testimony about the severity of
6 the symptoms if [the ALJ] gives ‘specific, clear and convincing reasons’ for the
7 rejection.” *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (citations
8 omitted). General findings are insufficient; rather, the ALJ must identify what
9 symptom claims are being discounted and what evidence undermines these claims.
10 *Id.* (quoting *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995)); *Thomas v.*
11 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) (requiring the ALJ to sufficiently
12 explain why it discounted claimant’s symptom claims)). “The clear and
13 convincing [evidence] standard is the most demanding required in Social Security
14 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
15 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

16 Factors to be considered in evaluating the intensity, persistence, and limiting
17 effects of a claimant’s symptoms include: 1) daily activities; 2) the location,
18 duration, frequency, and intensity of pain or other symptoms; 3) factors that
19 precipitate and aggravate the symptoms; 4) the type, dosage, effectiveness, and
20 side effects of any medication an individual takes or has taken to alleviate pain or

1 other symptoms; 5) treatment, other than medication, an individual receives or has
2 received for relief of pain or other symptoms; 6) any measures other than treatment
3 an individual uses or has used to relieve pain or other symptoms; and 7) any other
4 factors concerning an individual's functional limitations and restrictions due to
5 pain or other symptoms. SSR 16-3p, 2016 WL 1119029, at *7; 20 C.F.R. §§
6 404.1529(c), 416.929(c). The ALJ is instructed to "consider all of the evidence in
7 an individual's record," to "determine how symptoms limit ability to perform
8 work-related activities." SSR 16-3p, 2016 WL 1119029, at *2.

9 The ALJ found that Plaintiff's medically determinable impairments could
10 reasonably be expected to cause some of the alleged symptoms, but that Plaintiff's
11 statements concerning the intensity, persistence, and limiting effects of his
12 symptoms were not entirely consistent with the evidence. Tr. 44.

13 *1. Activities of Daily Living*

14 The ALJ found Plaintiff's activities of daily living were inconsistent with his
15 symptom claims. Tr. 44-45. The ALJ may consider a claimant's activities that
16 undermine reported symptoms. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.
17 2001). If a claimant can spend a substantial part of the day engaged in pursuits
18 involving the performance of exertional or non-exertional functions, the ALJ may
19 find these activities inconsistent with the reported disabling symptoms. *Fair v.*
20 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989); *Molina*, 674 F.3d at 1113. "While a

1 claimant need not vegetate in a dark room in order to be eligible for benefits, the
2 ALJ may discount a claimant's symptom claims when the claimant reports
3 participation in everyday activities indicating capacities that are transferable to a
4 work setting" or when activities "contradict claims of a totally debilitating
5 impairment." *Molina*, 674 F.3d at 1112-13.

6 Here, the ALJ found Plaintiff's activities of daily living are inconsistent with
7 his alleged disabling limitations. Tr. 44. Plaintiff reported being able to
8 independently handle his personal needs and household chores, including washing
9 dishes, vacuuming, sweeping, mowing the lawn, and doing laundry, shop for food,
10 and prepare meals. Tr. 44 (citing Tr. 331-34, 485, 493). Plaintiff stated he can lift
11 up to 40 pounds, stand for 45 minutes, sit for an hour, drive for several hours, walk
12 up and down stairs without a handrail, and grocery shop with a pushcart. Tr. 493.
13 Plaintiff reported caring for his disabled parents and a dog. Tr. 44 (citing Tr. 331).
14 Plaintiff also reported driving, taking public transit, camping, and fishing. Tr. 44
15 (citing Tr. 332-34).

16 Plaintiff argues the ALJ failed to make specific findings as to how his
17 activities are inconsistent with his allegations, and the ALJ did not obtain enough
18 information on the level of care Plaintiff provides for his parents. ECF No. 17 at
19 11-12. However, Plaintiff reported spending his days helping his parents, Tr. 331,
20 including helping clean the kitchen, taking the garbage out, assisting with dishes,

1 doing laundry, and shopping. Tr. 89-91. Plaintiff reported spending time on
2 weekends with a family friend, Tr. 334, and reported no difficulties with standing,
3 reaching, sitting, kneeling, stair climbing, concentration, completing tasks,
4 understanding, or following instructions. Tr. 335. Plaintiff reported going to his
5 sibling's home, and helping him or her vacuum. Tr. 96. Plaintiff's reports indicate
6 that he engages in a variety of personal care and household tasks, as well as social
7 activities, in a typical week, and he has reported capabilities that are beyond what
8 he has alleged in his application for benefits. On this record, the ALJ reasonably
9 concluded that Plaintiff's activities of daily living are inconsistent with his
10 symptom claims. This finding is supported by substantial evidence and was a clear
11 and convincing reason to discount Plaintiff's symptom complaints.

12 *2. Inconsistent Objective Medical Evidence*

13 The ALJ found the objective medical evidence was inconsistent with
14 Plaintiff's symptom claims. Tr. 40-45. An ALJ may not discredit a claimant's
15 symptom testimony and deny benefits solely because the degree of the symptoms
16 alleged is not supported by objective medical evidence. *Rollins*, 261 F.3d at 857;
17 *Bunnell v. Sullivan*, 947 F.2d 341, 346-47 (9th Cir. 1991); *Fair*, 885 F.2d at 601;
18 *Burch*, 400 F.3d at 680. However, the objective medical evidence is a relevant
19 factor, along with the medical source's information about the claimant's pain or
20 other symptoms, in determining the severity of a claimant's symptoms and their

1 disabling effects. *Rollins*, 261 F.3d at 857; 20 C.F.R. §§ 404.1529(c)(2),
2 416.929(c)(2).

3 The ALJ found Plaintiff's limitations in his upper extremities were not as
4 severe as he alleged. Tr. 40. In 2014, Plaintiff had slightly decreased strength in
5 his right arm, with full range of motion, no swelling, and intact sensation. *Id.*
6 (citing Tr. 443, 462). While Plaintiff reported left shoulder pain, his neurological
7 examination was normal. Tr. 40 (citing Tr. 409). In 2016, Plaintiff had decreased
8 range of motion in his left shoulder but normal reflexes and sensation in his upper
9 extremities. Tr. 40 (citing Tr. 426). At another examination in 2016, Plaintiff was
10 able to make a full fist and touch his thumb to each finger on both hands, he could
11 manipulate a coin, button, bow, and doorknob, he had full strength and normal
12 reflexes and sensation, and he had only slightly decreased strength on the right. Tr.
13 40-41 (citing Tr. 494-95). In 2017, Plaintiff had full range of motion and no
14 swelling of his right elbow, and he had a normal EMG and nerve conduction study,
15 Tr. 41 (citing Tr. 667, 686); although he had slight decreased reflexes at one exam
16 and a positive Tinel's sign at another, Plaintiff generally had normal sensation, full
17 strength, no atrophy, and normal range of motion, Tr. 41 (citing Tr. 563, 681, 685).
18 In 2018 and 2019, Plaintiff had only slightly reduced strength, and he had reduced
19 range of motion, but imaging showed only mild degenerative changes, with a
20

1 possible labral tear, and Plaintiff reported being able to engage in yardwork and
2 lifting up to 25 to 30 pounds. Tr. 41 (citing Tr. 670, 672-73, 677, 679).

3 The ALJ also found Plaintiff's back impairment was not as severe as
4 alleged. Tr. 41. Imaging showed only mild degenerative changes in the lumbar
5 spine. *Id.* (citing Tr. 393, 409, 421). At a 2014 examination, Plaintiff engaged in
6 self-limiting behavior, and the examiner opined there was no indication of an
7 underlying disk herniation nor lumbar radiculopathy. Tr. 41 (citing Tr. 409).
8 Plaintiff generally had normal reflexes and sensation in his lower extremities, and
9 generally had normal range of motion and gait, despite some abnormalities. Tr. 42
10 (citing Tr. 413, 493-95, 668-69, 673).

11 The ALJ also found Plaintiff's reported limitations due to mental health or
12 neurocognitive disorders were not supported by the evidence. Tr. 43. Plaintiff was
13 generally oriented, with a normal mood, and denied depression and anxiety. *Id.*
14 (citing Tr. 669, 673, 684). At a 2016 psychological evaluation, Plaintiff
15 demonstrated some abnormalities on examination, but had normal orientation, fund
16 of knowledge, concentration, and insight/judgment, he was able to recall three
17 items immediately and two out of three after a delay with prompting, and he
18 correctly performed six digits forward and four digits backward, and serial
19 subtraction testing. Tr. 43, 487-88. Dr. VanFossen also reviewed the 2016
20 evaluation and found Plaintiff was not credible due to his failure of the validity

1 measure. Tr. 37 (citing Tr. 501). While Plaintiff argues the ALJ did not cite to
2 specific inconsistent evidence, ECF No. 17 at 14, the ALJ gave a thorough
3 discussion of Plaintiff's symptom claims and the inconsistent objective evidence.
4 On this record, the ALJ reasonably concluded that Plaintiff's symptom claims are
5 inconsistent with the objective medical evidence. This finding is supported by
6 substantial evidence and was a clear and convincing reason, along with the other
7 reason offered, to discount Plaintiff's symptom complaints.

8 **C. Medical Opinion Evidence**

9 Plaintiff contends the ALJ erred in his consideration of the opinion of R.A.
10 Cline, Psy.D. ECF No. 19 at 15-21. There are three types of physicians: "(1) those
11 who treat the claimant (treating physicians); (2) those who examine but do not treat
12 the claimant (examining physicians); and (3) those who neither examine nor treat
13 the claimant [but who review the claimant's file] (nonexamining [or reviewing]
14 physicians)." *Holohan v. Massanari*, 246 F.3d 1195, 1201-02 (9th Cir. 2001)
15 (citations omitted). Generally, a treating physician's opinion carries more weight
16 than an examining physician's, and an examining physician's opinion carries more
17 weight than a reviewing physician's opinion. *Id.* at 1202. "In addition, the
18 regulations give more weight to opinions that are explained than to those that are
19 not, and to the opinions of specialists concerning matters relating to their specialty
20 over that of nonspecialists." *Id.* (citations omitted).

1 If a treating or examining physician's opinion is uncontradicted, the ALJ
2 may reject it only by offering "clear and convincing reasons that are supported by
3 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
4 "However, the ALJ need not accept the opinion of any physician, including a
5 treating physician, if that opinion is brief, conclusory and inadequately supported
6 by clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
7 (9th Cir. 2009) (internal quotation marks and brackets omitted). "If a treating or
8 examining doctor's opinion is contradicted by another doctor's opinion, an ALJ
9 may only reject it by providing specific and legitimate reasons that are supported
10 by substantial evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester*, 81 F.3d at 830-
11 31). The opinion of a nonexamining physician may serve as substantial evidence if
12 it is supported by other independent evidence in the record. *Andrews v. Shalala*,
13 53 F.3d 1035, 1041 (9th Cir. 1995).

14 On August 23, 2016, Dr. Cline, an examining source, performed a
15 psychological examination and rendered an opinion on Plaintiff's functioning. Tr.
16 484-88. Dr. Cline diagnosed Plaintiff with major depressive disorder, recurrent,
17 moderate, exacerbated by a traumatic brain injury; unspecified anxiety-related
18 disorder with features of social anxiety and generalized anxiety disorder; alcohol
19 use disorder, mild to moderate; and a provisional diagnosis of mild neurocognitive
20 disorder due to traumatic brain injury. Tr. 486. Dr. Cline opined Plaintiff's

1 depressed mood/irritability causes moderate limitations, Plaintiff's neurocognitive
2 deficits potentially cause moderate to marked limitations, but further testing and a
3 neuropsychological consult is necessary to evaluate the condition, and Plaintiff's
4 anxiety/social discomfort causes mild limitations. Tr. 485. Dr. Cline further
5 opined Plaintiff has moderate limitations in his ability to understand, remember,
6 and persist in tasks by following very short and simple instructions; understand,
7 remember, and persist in tasks by following detailed instructions; learn new tasks;
8 adapt to changes in a routine work setting; make simple work-related decisions,
9 ask simple questions, or request assistance; set realistic goals and plan
10 independently; and opined Plaintiff's overall severity rating is moderate. Tr. 486-
11 87. Dr. Cline opined Plaintiff has marked limitations in his ability to communicate
12 and perform effectively in a work setting; maintain appropriate behavior in a work
13 setting; and complete a normal workday/workweek without interruptions from
14 psychologically based symptoms; and opined Plaintiff has no to mild limitations in
15 the remaining areas. *Id.* Dr. Cline opined Plaintiff's limitations were expected to
16 last six to 12 months with treatment, cessation of alcohol would be helpful in
17 managing Plaintiff's depression, and noted Plaintiff needed a neuropsychological
18 evaluation. Tr. 487. The ALJ gave Dr. Cline's opinion some weight. Tr. 43. As
19 Dr. Cline's opinion is contradicted by the opinions of Dr. Van Fossen, Tr. 501, Dr.
20 Robinson, Tr. 129-31, and Dr. Donahue, Tr. 157-59, the ALJ was required to give

1 specific and legitimate reasons, supported by substantial evidence, to reject the
2 opinion. *See Bayliss*, 427 F.3d at 1216.

3 The ALJ found Dr. Cline's opinion that Plaintiff has marked limitations is
4 not supported by the evidence and instead relies on Plaintiff's subjective
5 complaints. Tr. 37, 43. A medical opinion may be rejected by the ALJ if it was
6 inadequately supported by medical findings and based too heavily on the
7 claimant's properly discounted complaints. *Bray*, 554 F.3d at 1228; *Tonapetyan*,
8 242 F.3d at 1149. While Plaintiff subjectively reported memory loss, irritability,
9 and getting into fights with others, the medical records generally indicate he had a
10 normal memory, and did not have issues getting along with others. Tr. 43-44
11 (citing Tr. 493, 681, 685). Dr. Cline summarized Plaintiff's reported symptoms in
12 several sections of the form. Tr. 484-88. In the section where Dr. Cline was asked
13 to document observations of Plaintiff's abnormal functioning, she instead only
14 detailed Plaintiff's self-report for multiple categories. Tr. 488. As such, the ALJ
15 did not error in concluded that Dr. Cline's opinion relied heavily on Plaintiff's self-
16 report.

17 The ALJ noted several inconsistencies between Dr. Cline's opinion and the
18 objective evidence. Tr. 37, 43. Plaintiff has reported spending time with others
19 three to four times per week. Tr. 38 (citing Tr. 335-36). The ALJ noted there was
20 no evidence in the record that indicated Plaintiff has difficulty with concentration,

1 persistence, or pace. Tr. 43-44. The only psychological examination file is Dr.
2 Cline's examination, and the ALJ noted Plaintiff failed the validity testing during
3 the examination. Tr. 37 (citing Tr. 501). Dr. Cline suggested Plaintiff have
4 neuropsychological testing, however it was never performed, and Plaintiff reported
5 never having any neurological follow-up. Tr. 37, 485. Plaintiff has also repeatedly
6 denied symptoms of anxiety. Tr. 37 (citing Tr. 561, 669, 684). The ALJ's finding
7 that Dr. Cline's opinion that Plaintiff has marked limitations is inconsistent with
8 the evidence is supported by substantial evidence.

9 Plaintiff also contends the ALJ erred in failing to incorporate Dr. Cline's
10 opinion regarding Plaintiff's moderate limitations into the RFC. ECF No. 17 at 16-
11 17. Dr. Cline opined Plaintiff has moderate limitations in several areas of
12 functioning discussed *supra*, including following simple and detailed instructions,
13 learning new tasks, and adapting to changes. Tr. 486. The ALJ accounted for Dr.
14 Cline's opinion by limiting Plaintiff to one to three-step tasks, and occasional
15 interactions with coworkers and the general public. Tr. 39. While Plaintiff argues
16 the ALJ failed to properly account for the moderate limitations in the RFC, ECF
17 No. 17 at 16-17, the ALJ reasonably interpreted Dr. Cline's opinion and accounted
18 for it in the RFC. Where the ALJ's interpretation of the record is reasonable as it
19 is here, it should not be second-guessed. *See Rollins*, 261 F.3d at 857. The Court
20 must consider the ALJ's decision in the context of "the entire record as a whole,"

1 and if the “evidence is susceptible to more than one rational interpretation, the
2 ALJ’s decision should be upheld.” *Ryan v. Comm’r of Soc. Sec.*, 528 F.3d 1194,
3 1198 (9th Cir. 2008) (internal quotation marks omitted). Plaintiff is not entitled to
4 remand on these grounds.

5 **CONCLUSION**

6 Having reviewed the record and the ALJ’s findings, the Court concludes the
7 ALJ’s decision is supported by substantial evidence and free of harmful legal error.

8 Accordingly, **IT IS HEREBY ORDERED:**

9 1. Plaintiff’s Motion for Summary Judgment, **ECF No. 17**, is **DENIED**.

10 2. Defendant’s Motion for Summary Judgment, **ECF No. 18**, is
11 **GRANTED**.

12 3. The Clerk’s Office shall enter **JUDGMENT** in favor of Defendant.

13 The District Court Executive is directed to file this Order, provide copies to
14 counsel, and **CLOSE THE FILE**.

15 DATED August 24, 2021.

16 s/Mary K. Dimke
17 MARY K. DIMKE
18 UNITED STATES MAGISTRATE JUDGE
19
20